

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Original & Affidavit of M. Appleby

77-1170

To be argued by
RICHARD APPLEBY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 77-1169, 77-1170

UNITED STATES OF AMERICA,

Appellee,

—v.—

EUGENE WELCOME and DORIS ELAINE MILLER,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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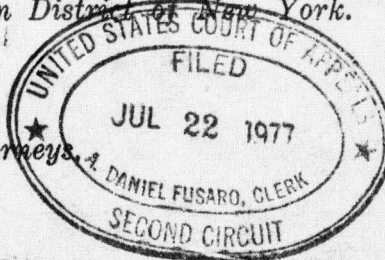


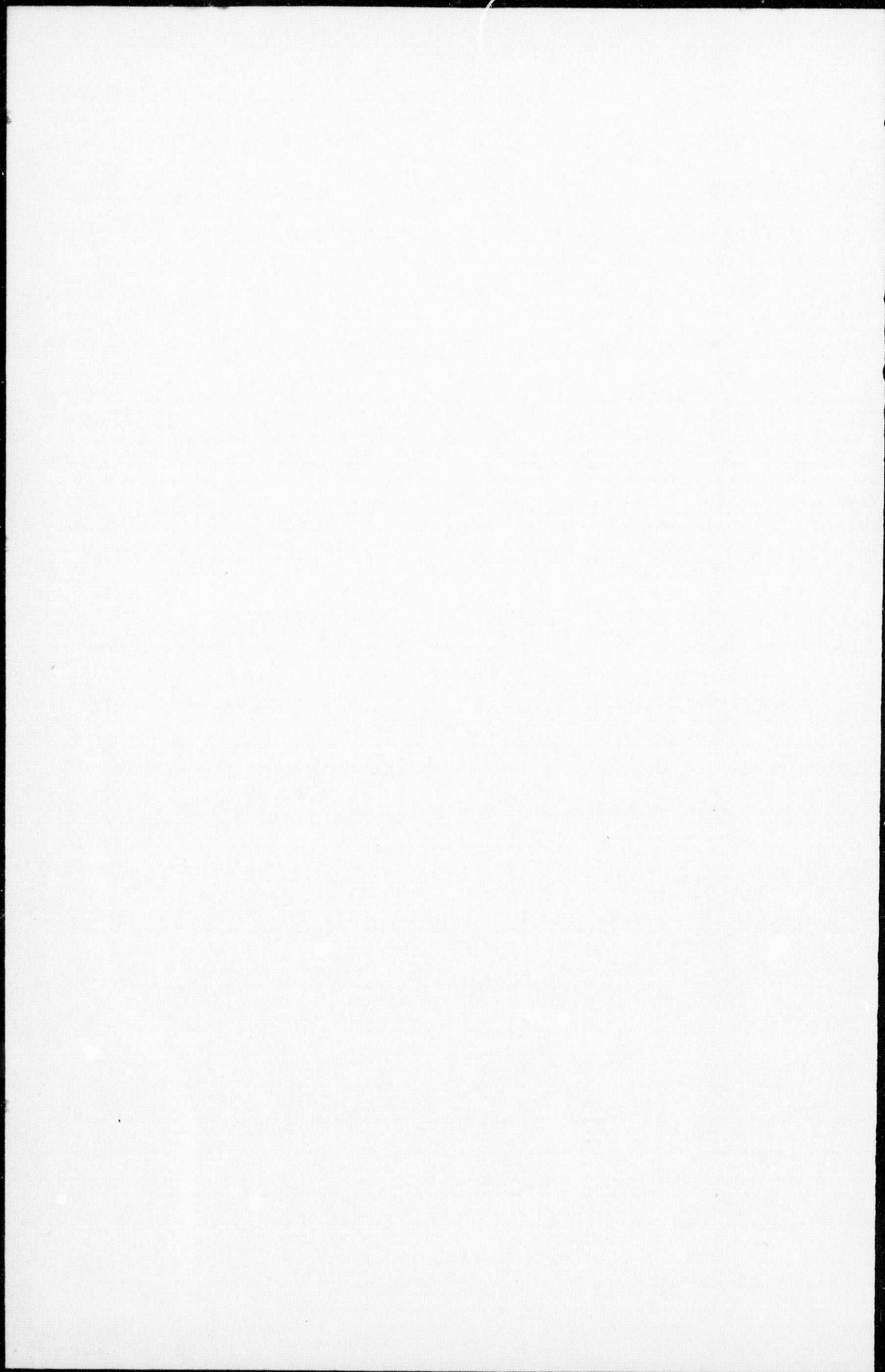
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EUGENE WELCOME and DORIS ELAINE MILLER,
Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

This is an appeal from judgments of conviction entered in the United States District Court for the Eastern District of New York (Bartels, J.), following a jury trial, convicting appellant Eugene Welcome of the armed robbery on November 10, 1975 of the Chemical Bank, 837 Flatbush Avenue, Brooklyn, New York (Counts Two and Three), in violation of Title 18, United States Code, Sections 2113 (a) and (d), and convicting appellant Doris Elaine Miller of receiving the proceeds of said robbery (Count Four), in violation of Title 18, United States Code, Section 2113 (c).¹ On December 10, 1976,

¹ Miller was also charged with the armed robbery of the Chemical Bank (Counts Two and Three), but was acquitted on those counts. The indictment also charged a conspiracy among defendants Welcome, Miller and DeWitt Owens (Count One), as well as charging Welcome with the illegal possession of a firearm, having previously been convicted of a felony (Count Five). These counts were dismissed on motion of the Government.

Welcome received concurrent twenty year terms of imprisonment on Counts Two and Three and he is presently in custody.² On March 25, 1977, Miller was sentenced pursuant to the Youth Corrections Act, Title 18, United States Code, Section 5010 (b). Execution of Miller's sentence was suspended, and she was placed on probation for three years.

On appeal appellant Welcome contends that the trial court abused its discretion in permitting the Government to introduce evidence of a subsequent bank robbery as a similar act. Welcome also contends that Judge Bartels' conduct during the trial deprived him of a fair trial. Specifically, he claims that the trial judge disparaged his attorney in front of the jury and unduly restricted counsel's summation and his cross-examination of a bank witness at a *Simmons* hearing.

Appellant Miller also takes issue with the trial court's conduct, claiming that it excessively intervened in the trial. Miller further claims that there was insufficient evidence to convict her for receiving the proceeds of the robbery. Finally, Miller asserts that the prosecutor's summation was improper.

² On the date of his sentencing, Welcome also pleaded guilty to one count of a separate indictment, charging him with the illegal possession of a sawed-off shotgun, in violation of Title 26, United States Code, Sections 5861(d) and 5871, in connection with the armed robbery on March 1, 1976 of the Chemical Bank, 395 Flatbush Avenue Extension, Brooklyn, New York. Welcome received a suspended sentence and five years probation, to run consecutively to the sentence imposed for the November 10, 1975 robbery of the Chemical Bank.

Statement of Facts

A. Government's Case

The Government's case consisted principally of the testimony of unindicted co-conspirator Vanessa Hodges³ and co-defendant DeWitt Owens,⁴ coupled with various corroborative evidence.

In October, 1975, Welcome owned a grocery store on Nostrand Avenue in Brooklyn, named the "Milkman". Welcome's employees included Hodges, Owens, Willie Leach⁵ and appellant Doris Miller. When business became bad towards the end of October, Welcome suggested to Hodges that they commit a bank robbery (60).⁶

Owens and Leach were later recruited for the robbery, and on October 31, 1975 Welcome discussed the proposed robbery with them at the "Milkman". Welcome explained that he had already surveilled the Chemical Bank on Flatbush Avenue and thought it would be an easy target since it was in a busy neighborhood. He further explained that Monday would be the best day to "hit" the bank because the deposits from the weekend could be obtained (455). Welcome stated that "we're going to be pros * * * and when we get the money

³ Prior to trial, Hodges pleaded guilty to conspiracy to rob the Chemical Bank, 395 Flatbush Avenue Extension, Brooklyn, New York, on March 1, 1976. After the instant trial, Judge Bartels sentenced Hodges to a five year suspended sentence. Shortly after being placed upon probation, Hodges violated probation and was sentenced to a five year prison term, which she is currently serving.

⁴ Owens pleaded guilty to Count Two of the indictment (bank robbery without a weapon). After trial he was sentenced to ten years imprisonment which he is currently serving.

⁵ Leach, an unindicted co-conspirator, was killed during the course of an armed robbery on December 31, 1975 (151).

⁶ All references are to the trial transcript.

we are going to know how to be disciplined with it and we are to take and invest it into a corporation and have the stores he gets made larger than he got and to try to own the whole of Nostrand Avenue. That was Eugene's 'dream' ". (461). Indeed, at one time Welcome did, in fact, own five stores in Brooklyn (343).

The next day, November 1, 1975, Welcome, Leach, Owens and Hodges met at the store to discuss the robbery (458). Welcome assigned to his cohorts their respective roles in the robbery. Hodges was to be the getaway driver. Welcome assigned himself the role of vaulting the counter and scooping up the loot. Owens and Leach were designated to control the banking floor. Welcome told Owens he would carry a sawed-off double-barrelled shotgun and Leach and he would have revolvers (460-461).

On Saturday, November 8, 1975, Welcome, Leach, Owens and Hodges again met at the store to discuss their respective roles (464). Welcome told Hodges to ask Miller for her large bag in which to place the loot. He also told the others to obtain gloves (467).

On Sunday, November 9, 1975, Welcome, Miller, Hodges and Leach had their final meeting. The plans were again reviewed. At the conclusion of the meeting, Welcome gave Leach a sawed-off shotgun, instructing him to store it in Miller's house on Gates Avenue in Brooklyn. Welcome said that on the following morning he would pick up Hodges, Owens and Leach at Miller's house (469).

Owens, Hodges, Leach and Miller spent the night at Miller's house. Leach was Miller's boyfriend and lived with her on Gates Avenue (169). That night Leach and Owens discussed the next day's robbery in Miller's bedroom. Leach found a large chest which contained

the "artillery" for the robbery, a sawed-off shotgun, two handguns and ammunition. Leach showed Owens the guns and stated: "If we get caught in the bank we have it planned anyway. We will do what we have to do; we will kill ourselves" (472).

Early the following morning, November 10, 1975, Owens and Hodges went to purchase ski masks for the robbery. However, no stores were open. The two then bought some heroin to gain courage (74-76; 472, 476). Owens and Hodges returned to Miller's house where Welcome was waiting. Miller supplied the robbers with pantyhose in lieu of the ski masks and also a large bag in which to place the loot (87; 475-476). Welcome, Hodges, Owens and Leach then left to commit the robbery.

After the four arrived in the vicinity of the Chemical Bank, Hodges entered the bank to determine the location of the guards. The three men entered the bank, Welcome announcing "This is a stick up". Welcome vaulted the counter with Miller's bag in hand. Owens and Leach controlled the banking floor with their weapons. As Welcome was scooping up the money, Owens noticed a man peering through the bank's window. According to a pre-arranged signal, Owens yelled "Time, boy", whereupon Welcome re-vaulted the teller's counter carrying the money in several bank trash bins. In his haste, Welcome forgot Miller's bag containing some of the loot. The four later met at Miller's house on Gates Avenue (479-481).

At Miller's house, Welcome instructed Hodges to go to the "Milkman" and tell Miller to return to her house to assist in dividing the money (98; 481). When Hodges arrived at the store, she lifted Miller in her arms and exclaimed "We did it, we did it" (98). Miller then left to help divide the money.

At her house, Miller got a knife and assisted the others in cutting up the money bags and counting the loot, approximately \$35,000 (481). Welcome gave Owens \$4,000, plus an additional \$1,000 for Hodges. Later that day Welcome told Hodges that he had given Miller \$1,000 of the proceeds. Leach also told Owens that Miller had received some of the proceeds. Owens also testified that he gave Miller part of the proceeds when the two went shopping (451; 658).

Hodges also testified to a subsequent bank robbery⁷ that she and Welcome committed three and one-half months later, on March 1, 1976, at another branch of the Chemical Bank, also on Flatbush Avenue in Brooklyn.

Toward the end of February, 1976, Welcome told Hodges that he was in need of money again and asked her if she was interested in robbing another bank. On Monday, March 1, 1976, after preparing themselves with masks and gloves, Welcome and Hodges proceeded to the Chemical Bank, located at 395 Flatbush Avenue Extension, Brooklyn. The bank was closed when the two arrived. They waited until 8:00 A.M. when the branch manager, Robert Gilbert arrived.⁸ Welcome forced Gilbert into the bank at gunpoint (950). Inside the bank Welcome demanded of Gilbert the weekend night deposit monies. Gilbert stated that he could only open the night deposit vault at 8:30 A.M., otherwise, the alarm would sound (950). Welcome instructed Gilbert to act normally, while he and Hodges crouched behind

⁷ This bank robbery was not charged in the indictment. Rather, the evidence was admitted as a subsequent similar act. This is the subject of Point I, *infra*.

⁸ During the Government's rebuttal case, Robert Gilbert, the branch manager of the bank, also testified to this robbery (983-991).

the teller's counter and waited until the alarm was deactivated. After having been in Gilbert's immediate presence for ten minutes, Welcome and Hodges donned their masks. At 8:30 A.M. Welcome placed the night deposit bags in a canvas bag which he had taken with him into the bank and then placed the canvas bag into a teller's trash bin (996). Hodges and Welcome departed the bank separately and later met at Miller's house on Gates Avenue where Miller was waiting (162). The loot, approximately \$54,000 in cash, was divided, Hodges receiving \$17,000, Miller \$1,000, and Welcome the balance. Welcome used some of the proceeds to construct a new store (344).

The corroborative evidence of the November 10, 1975 bank robbery consisted of the following: following the robbery, the F.B.I. searched the Chemical Bank and seized Miller's bag which Welcome had forgotten to take. The bag contained a house key which fit the vestibule door of Welcome's residence at 662 Park Place in Brooklyn (676, 719). A duplicate of this key was found upon Miller's person at the time of her arrest (723). In June 1976, the F.B.I. conducted a search of Miller's residence at 346 Gates Avenue. Two loaded revolvers, a sawed-off shotgun and ammunition were seized (688).⁹

B. The Defense Case

Testifying in his own behalf, Welcome denied having participated in both the November 10, 1975 Chemical Bank robbery and the March 1, 1976 Chemical Bank robbery (796). Welcome admitted that he had been

⁹ Miller contended at trial that these guns belonged to Willie Leach, Miller's boyfriend. However, as noted above, Leach died on December 31, 1975 during the course of a bank robbery (151).

convicted in 1967 for armed robbery for which he received a sentence of from fifteen to thirty years imprisonment, and for which he served eight years (804). Welcome admitted to the possession of one of the guns that was introduced in evidence (816).

Miller also testified in her own behalf and denied any knowledge of either bank robbery. (892-897).

C. Government's Rebuttal Case

Robert Gilbert, branch manager of the Chemical Bank, 395 Flatbush Avenue Extension, Brooklyn, New York testified about the March 1, 1976 above-described robbery of his branch by Welcome and Hodges and positively identified Welcome as the male robber (991).

ARGUMENT

POINT I

The Subsequent Similar Act Evidence Of The March 1, 1976 Chemical Bank Robbery Was Properly Admitted.

Appellant Welcome argues that the trial judge abused his discretion in admitting as a subsequent similar act evidence of the March 1, 1976 Chemical Bank robbery.¹⁰ Specifically, Welcome contends that this evidence had no probative value on the grounds upon which it was offered—identity and common scheme or plan—since allegedly identity was not in issue and since the evidence failed to show that the second bank robbery was part of a common scheme. We disagree and contend that the trial

¹⁰ Miller does not raise this point in her brief except insofar as she adopts all issues raised by Welcome.

judge acted well within his discretion in admitting this evidence.

The rule in this Circuit regarding evidence of similar crimes is an inclusionary one, that is, that such evidence is admissible "for all purposes" except to show the criminal character or disposition of the defendants. *United States v. Warren*, 453 F.2d 733 (2d Cir.), cert. denied, 406 U.S. 944 (1972) (emphasis supplied); *United States v. Gerry*, 515 F.2d 130 (2d Cir.), cert. denied, 423 U.S. 832 (1975); *United States v. Brettholz*, 485 F.2d 483 (2d Cir. 1973), cert. denied, sub. nom. *Santiago v. United States*, 415 U.S. 976 (1974); *United States v. Deaton*, 381 F.2d 114 (2d Cir. 1967); see also, Federal Rules of Evidence, Rule 404(b). Furthermore, subsequent criminal acts are admissible to prove the same factors as prior criminal acts. *United States v. Super*, 492 F.2d 319 (2d Cir.), cert. denied, sub. nom., *Burns v. United States*, 419 U.S. 876 (1974); *United States v. Nathan*, 476 F.2d 456, 460 (2d Cir.), cert. denied, 414 U.S. 823 (1973); *United States v. Diorio*, 451 F.2d 21, 23 (2d Cir. 1971), cert. denied, 405 U.S. 955 (1972).

In ruling on the admissibility of evidence of similar acts, the trial judge is required "to balance the probative value of the proffered evidence, on the one hand, against its prejudicial character, on the other." *United States v. Byrd*, 352 F.2d 570, 574 (2d Cir. 1965). Several factors are involved in this balancing: (1) the strength of the defendant's connection with the similar act, *United States v. Drummond*, 511 F.2d 1049, 1055 (2d Cir.), cert. denied, 423 U.S. 844 (1975); *United States v. Brettholz*, supra; (2) the proximity in time between the similar act and the act charged in the indictment; (3) the similarity in *modus operandi* between the acts charged and the similar act, *United States v. Smith*, 343 F.2d 607, 608-609 (2d Cir. 1965); and (4) whether the Government has an actual need for the proffered evidence in light of the issues and the other evidence available to it, *United States v. Brettholz*, supra; *United States v. Byrd*, supra.

First, both appellants Welcome and Miller were directly linked to this second robbery. Welcome entered the bank; Miller received the proceeds at her home on Gates Avenue and was rewarded with a portion thereof for her assistance. Second, the robberies were extremely close in time—just three and one-half months apart. Third, the *modus operandi* was strikingly similar. Three out of five of the robbers—Welcome, Hodges and Miller—participated in the second robbery. Their roles were the same: Hodges and Welcome entered the bank; Miller later received the proceeds at her house. The motive was the same: to alleviate the poor financial condition of Welcome's stores and to further Welcome's scheme of owning all stores on Nostrand Avenue. Welcome was the "mastermind" in both cases. Guns and masks were used in both robberies. Both robberies were committed on a Monday with the bank's weekend deposits as the goal. Both robberies were committed at a branch of the Chemical Bank and each was located on Flatbush Avenue in Brooklyn. In both robberies the loot was divided at Miller's residence on Gates Avenue. The robberies were similar down to the fine details: in both cases Welcome placed the loot in trash bins which he found behind the teller's counters. The above demonstrates beyond question that not only was the *modus operandi* similar, but that the November 10, 1975 robbery was part of a common scheme on Welcome's part, part of "Eugene's dream", to own every store on Nostrand Avenue and to rob a bank whenever the "dream" was threatened.

Fourth, the need for the evidence was great. Contrary to Welcome's assertion, identity was most certainly in issue. The robbers in the November 10, 1975 robbery wore masks and gloves so that no customer or employee was able to identify any of the participants. Counsel, in their opening statements, specifically denied that their clients had committed the November 10th robbery. Counsel's cross-examination of the Government's accom-

police witnesses was designed to show that they had falsely implicated Welcome and Miller in the robbery. Thus, identity was in issue and Vanessa Hodges' testimony concerning the March 1, 1976 robbery was probative circumstantial evidence that Welcome and Miller had committed the first robbery. Moreover, the *modus operandi* and circumstances leading up to the two robberies were so similar that the jury could have inferred that the robberies were part of a common scheme. Finally, evidence that Miller received the proceeds on a subsequent robbery was strong circumstantial evidence on Count Four (knowingly receiving proceeds of a bank robbery, 18 U.S.C. § 2113(c)) that she knew that the monies she received on November 10th were the proceeds of a bank robbery.

Welcome's argument (Br., pp. 11-12), that identity was not in issue since there was no dispute that Hodges knew Welcome, misses the point. The critical issue was not whether Hodges knew Welcome but whether Welcome committed the bank robbery charged in the indictment. On this score the parties were in sharp disagreement, and for this reason the evidence was probative. And, of course, the fact that the same witness testified to both acts does not preclude admissibility of the similar act evidence. *United States v. Chestnut*, 533 F.2d 40 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976).

Judge Bartels was mindful of the impact of the similar act testimony and went to great lengths on a number of occasions during the trial to protect Welcome's rights and insure that he would not be unfairly convicted on the ground that he was considered to be a "bad person". First, at the time evidence of the subsequent similar but uncharged robbery was first introduced through the testimony of Vanessa Hodges, the judge carefully instructed the jury on the limited purpose of such

evidence (154-155, 158). Moreover, Judge Bartels interrupted the prosecutor's summation on two occasions to give limiting instructions concerning this similar act evidence (1055-1056, 1092). Third, the charge to the jury included an extensive instruction on the limited reason for admission of evidence of the second robbery (1230-1233). Finally, Judge Bartels prohibited the Government from introducing, in its case-in-chief, the testimony of branch manager Robert Gilbert, the eyewitness to the March 1, 1976 robbery. In making this ruling the Court stated: "You see, I have to be very careful. I don't want to emphasize the March 1st, 1976 robbery too much" (745). It was only when Welcome took the stand and denied having participated in the March robbery that the trial court permitted the Government to introduce the testimony of Gilbert as rebuttal evidence.

The record reflects that the trial court carefully applied the law of this Circuit to the facts of the case and reached a fair compromise in terms of the methods in which the similar act would be admitted. In *United States v. Leonard*, 524 F.2d 1076 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976), this Court stated:

"In any case, the weighing of the probative value of the evidence against its potentially prejudicial effect is primarily for the trial judge who has a feel for the effect of the introduction of this type of evidence that an appellate court, working from a written record, simply cannot obtain. . . 'His determination will rarely be reversed on appeal.'" *supra* at 1092, quoting *United States v. Ravich*, 421 F.2d 1196, 1204 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970).

We submit that Judge Bartels acted well within his discretion in permitting Hodges to testify to the March 1st robbery.

POINT II**There Was Sufficient Evidence To Convict Miller Of Knowingly Receiving The Proceeds Of The Robbery.**

Appellant Miller contends that there was insufficient evidence to convict her of knowingly receiving, possessing and concealing the proceeds of a bank robbery (Count Four), in violation of 18, U.S.C. § 2113(c). This contention is easily refuted by a review of the evidence.

Both Hodges and Owens testified that Miller stored the sawed-off shotgun, the two revolvers and the ammunition that was used in the robbery in a chest in her bedroom. Indeed, on June 18, 1976 the F.B.I. seized a sawed-off shotgun, two revolvers and ammunition from her apartment. Hodges and Owens further testified that Miller was present at the key November 9th meeting at the "Milkman" where the plans for the next day's robbery were finalized. Miller supplied the robbers with her pantyhose for masks. She gave them a bag in which to place the loot. After the robbery, the robbers met at Miller's house and there the loot was divided. Owens testified that, following the robbery, Miller got a knife and helped cut up the money bags. Hodges testified that after the robbers arrived at Miller's residence, Welcome specifically asked Hodges to get Miller from the store to assist in dividing the proceeds. Finally, Hodges testified that after the March 1, 1976 robbery, the proceeds were again divided at Miller's residence on Gates Avenue, with Miller's assistance, and that Miller received a cut of \$1,000. This evidence conclusively established Miller's guilt on Count Four.

Miller further argues that to sustain a conviction under 18, U.S.C. § 2113(c), there must be proof that she actually received the proceeds of the bank robbery and that her taking the bank money bags at her home, cutting

them open and counting the proceeds does not suffice. Certainly, Miller received the monies stolen from the bank. The fact that after she helped the others count the money she returned it to them, hardly means that there was not an unlawful knowing receipt in violation of section 2113 (c). Moreover, there was ample proof of an unlawful conspiracy to rob the Chemical Bank—a conspiracy of which Miller was established, by non-hearsay evidence, to be a member.. Thus, Welcome's statement to co-conspirators Owens and Hodges that Miller had received \$1,000 of the robbery proceeds is additional evidence to sustain her conviction. It is, of course, well-settled that if a conspiracy is proved, even though not charged, co-conspirator statements are admissible to prove the substantive crime. *E.g., United States v. Richardson*, 477 F.2d 1280 (2d Cir.), *cert. denied*, 414 U.S. 843 (1973).

POINT III

Judge Bartels' Conduct Did Not Deprive Appellants Of A Fair Trial.

Both appellants Miller and Welcome contend that, for various reasons, Judge Bartels' conduct of the trial denied them a fair trial. Miller contends that the judge intervened excessively in the examination of Government witnesses. Welcome contends that the trial court unduly limited his attorney's cross-examination of bank manager Robert Gilbert at a *Simmons* hearing.¹¹ Welcome also argues that the judge interrupted his summation unnecessarily. Welcome speculates that the judge took these actions either because of the judge's personal scheduling concerns or because of an animus toward his attorney. We submit that an examination of the record reflects that Judge Bartels was scrupulously fair in his conduct of the trial and that these innuendos are entirely without merit.

¹¹ *Simmons v. United States*, 390 U.S. 377 (1968).

A. Excessive intervention

While a trial judge must avoid at all times even the appearance of partiality, *United States v. Glazion*, 402 F.2d (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969), he unquestionably is entitled to interrupt the examination of witnesses and to ask questions in order to clarify the issues of the trial. *United States v. Curcio*, 279 F.2d 681, 682 (2d Cir.), *cert. denied*, 364 U.S. 824 (1960); *United States v. Pellegrino*, 470 F.2d 1205, 1206-1208 (2d Cir. 1972), *cert. denied*, 411 U.S. 918 (1973).

The trial judge cannot discharge his responsibility to see that the law is properly administered "by remaining inert". *United States v. Marzano*, 149 F.2d 923, 925 (2d Cir. 1945). Or to put it another way, a federal judge in the conduct of a criminal trial is not a mere "automaton". *United States v. Gori*, 282 F.2d 43, 45 (2d Cir. 1960), *aff'd* 367 U.S. 364 (1961). Indeed, the judge "enjoys the prerogative, rising often to the standard of a duty, of eliciting those facts he deems necessary to the clear presentation of the issues." *United States v. Brandt*, 196 F.2d 653, 655 (2d Cir. 1952). The judge must play an active role ". . . where necessary to clarify testimony and assist the jury in understanding the evidence." *United States v. DeSisto*, 289 F.2d 833, 834 (2d Cir. 1961).

When viewed in the light of the foregoing authority and the record as a whole, Miller's argument is revealed as being meritless. Indeed, apart from a bare list of citations to the record, Miller has cited only one instance of the judge's alleged partiality. In that instance, counsel was cross-examining accomplice witness Owens concerning an irrelevant issue—the identity of Owens' source of supply for heroin—and the witness asked the Court if he had to answer. Thereupon, the following colloquy occurred (567-568):

Q. Incidentally, who did you buy the heroin from on the morning of November 10, 1975?

A. From this garage.

Q. What is the name of the person?

A. Do I have to give their name up?

THE COURT: No.

THE WITNESS: I refuse to.

THE COURT: He has a right to.

MR. SUNDEN [Counsel for Welcome]: He has a right to protect the name of a drug seller.

THE COURT: He has a right to refuse to testify as to participation in the purchase by himself of heroin; you know that's prohibited.

MR. SUNDEN: He already conceded to it and the prosecution brought it out.

THE COURT: I don't care what the prosecution did.

Do you feel you will be in danger?

THE WITNESS: Yes.

THE COURT: I don't know why you want it either.

MR. SUNDEN: I want—

THE COURT: I'm going to tell you he has a right to refuse to give the name.

MR. SUNDEN: I respectfully except.

THE COURT: I know you do. Proceed to the next question. We are trying this case, not other cases. If this man says he uses heroin, you could bring that out, but you want to go into details of a purchase and disclose the name of the people.

MR. SUNDEN: He may not be telling the truth.

THE COURT: He is telling the truth. He wants to protect himself of participation of other crimes; that's not a violation of that agreement.

What do you have to say?

MR. DiCARLO [Counsel for Miller]: I object to Your Honor's statement that he is telling the truth.

THE COURT: I don't know whether he is telling the truth or not, but he claims he's telling the truth it's up to the jury to decide whether he's telling the truth. If I made that statement I withdraw it, but I'm not here to decide that, I'm here to decide what is a proper cross examination and what is not, and this is improper. Proceed to something else.

It is clear from the above that when the judge stated "[h]e is telling the truth" he was referring to the fact that Owens was telling the truth about his involvement with heroin. However, when counsel objected to this statement, the court immediately corrected its statement, and gave the quoted curative statement. There was no further objection or request for any further instructions by either defense counsel.

The other examples of "excessive intervention" cited by Miller are, by concession in appellant's brief (Br. p. 12), instances in which the judge was merely trying to clarify the testimony of Owens and Hodges. In each of the cited instances of intervention (Br. p. 12), the record reflects that the judge asked neutral questions in order to clarify the testimony. Miller, however, seems to be arguing that even if the questions were merely to clarify testimony, by the large number of questions posed by the court, the jury could have inferred that the court was satisfied with the accomplices' testimony. This is absurd. It is settled that the mere counting of the number of questions asked by a judge do not furnish a basis for

reversal; it is only when the judge abandons his judicial role and becomes an advocate that the rule against judicial intervention is implicated. *United States v. DeSisto*, 289 F.2d 833, 834 (2d Cir. 1961).

The cases upon which Miller relies are simply dissimilar to this case. In *United States v. Nazzaro*, 472 F.2d 302, 307-308 (2d Cir. 1973), in addition to rehabilitating a prosecution witness and taking an active part in the cross-examination of defense witnesses, the trial judge engaged in numerous acrimonious exchanges with defense counsel in the presence of the jury. In *United States v. Grunberger*, 431 F.2d 1062 (2d Cir. 1970), questioning the defendant, the trial court strongly indicated his incredulity concerning the defendant's story. Here there is no claim that the judge indicated his disbelief in Miller's story.

United States v. D'Anna, 450 F.2d 1201 (2d Cir. 1971), also cited by Miller, actually supports the Government's position. In that case this Court held that where a judge has played "a more active role than may be desirable in most cases", a conviction should be affirmed where the judge has properly charged the jury that they are to draw no conclusions from his participation. *Id.* at 1206. In the case at bar the trial judge instructed the jury at length to draw no conclusion from his statements or rulings (7, 1205-1207).

B. Curtailment of Counsel's Summation

Welcome asserts that the trial court did not permit his attorney, Mr. Sunden, a reasonable time for summation. On October 13, the day prior to summations, Mr. Sunden requested two and one-half hours for his summation. The Government requested forty-five minutes and Mr. DiCarlo, counsel for Miller, requested one hour. The judge denied the request and granted Mr. Sunden one hour for his summation (879-880).

The record reflects that, in an attempt to create doubt where none existed, counsel made every conceivable argument in his summation. Indeed, Welcome does not advance a single argument that he was precluded from presenting as a result of the time limitation. As Welcome concedes in his brief (Br. p. 19), a trial judge has broad discretion in setting reasonable limits on counsel's summation. One hour and fifteen minutes was ample time for a simple bank robbery case that took five days to try¹².

C. Curtailment of counsel's cross-examination of Robert Gilbert

There is also no merit to the contention that Welcome's attorney was arbitrarily limited in his cross-examination of, the bank manager, Robert Gilbert at the *Simmons* hearing. It will be recalled that Judge Bartels permitted the Government to call Gilbert as a rebuttal witness after Welcome denied having participated in the March 1, 1976 robbery. Prior to his testimony before the jury, a *Simmons* hearing was requested of Gilbert who had identified Welcome from an array of six photographs on June 14, 1976 as the person who robbed his bank.¹³

¹² Interestingly, counsel for Miller was able to complete his summation in 39 pages (as contrasted to Welcome's counsel who took 50 pages) of transcript.

¹³ As his brief concedes at least two days prior to trial, Welcome knew of the Government's intention to offer, in its direct case, the testimony of Gilbert, who he also knew had identified Welcome from photographs, (Br. p. 14). Nevertheless, counsel did not make any pretrial motions nor did he request a *Simmons* hearing. Despite the fact that Judge Bartels stated that Welcome should have made a pretrial motion, he permitted the hearing in the midst of trial. In commenting to counsel on his failure to make the motion prior to trial, the judge stated: "This is most unusual. I am doing it in order that there can't be any complaints on the part of defense counsel. This thing should have been done some time ago, before the trial." (963).

At the hearing, Gilbert testified that he observed Welcome at close range for ten minutes without his mask and was unequivocal that Welcome was the bank robber (962). Gilbert testified that the F.B.I. agent who displayed the array of photographs to him did not suggest, through actions or words, which photograph he should choose (965).

On cross-examination, Welcome's counsel attempted to establish that Gilbert could have been mistaken in his identification and that the F.B.I. used a suggestive array. When counsel insisted on having the witness draw comparisons between each photograph in the array and Welcome's face, the judge became impatient, apparently because the photographs spoke for themselves. The court indicated that counsel's tactic was merely to delay the trial, found that Gilbert's identification was proper, and ordered the trial to recommence. It is significant that in the unrestricted cross-examination of Gilbert at the trial, Welcome's attorney did not develop anything more than he did at the hearing. Indeed, counsel's examination strengthened Gilbert's identification because he elicited from Gilbert that, before Welcome donned his mask, Welcome personally searched Gilbert's person on one occasion and, on another occasion, Welcome offered him a cigarette (992; 1000). It is therefore apparent that even had Welcome's attorney been given further time to cross-examine Gilbert at the hearing, such additional examination would have been futile. But in any event, since cross-examination may be properly restricted by the trial court there was no error. *United States v. Green*, 523 F.2d 229 (2d Cir. 1975), See Fed.R.Ev. Rule 611(a).

D. The Judge's alleged improper motives

Since it is clear from the foregoing that Judge Bartels did not arbitrarily restrict Welcome's attorney in any phase of the trial, it is disingenuous to suggest, without

any basis in the record, that the judge somehow acted with alleged improper motives. Nevertheless, to rebut this uncalled for innuendo we note that there is nothing in the record to suggest that any ruling of the court was based upon the court's concern for its personal affairs. This baseless assertion is somehow gleaned from a post-verdict statement by Judge Bartels that he had to leave on the following day by 11:00 o'clock (1298). This statement, coupled with an earlier one by Judge Bartels that "I've got to be completed by Thursday" is now raised to a level of impropriety. This is nonsense. Indeed, the latter comment was made after Mr. Sunden, Welcome's attorney, was late for court on the morning of October 12 (in the middle of the trial) and was a clear admonition that Judge Bartels expected all the lawyers to be punctual. But, even so, on several occasions court was adjourned early to accommodate each defense counsel's personal schedule: On October 6, 1976, at Mr. Sunden's request, Judge Bartels ended the court day early to allow him to keep a scheduled appointment (330). Again, on October 7, 1976, Judge Bartels also ended the court day early to allow Mr. DiCarlo to keep an engagement (570). Finally, although initially the court sought to have summations begin on October 13, at the request of both defense counsel, the judge ended that day early to allow them to prepare their summation for the following day, October 14. Thus, we submit that it is simply hypocritical to suggest that there was any improper desire on the part of Judge Bartels to allow his personal schedule to distract from the important task of conducting a criminal trial. If anything, it was the failure of the defense to be on time and their desire to meet their own personal commitments that prompted the off-hand remark by Judge Bartels that is now elevated to so-called prejudicial error.

Second, there is simply no support for Welcome's claim that Judge Bartels had any animosity toward his attorney. As the record reflects, the interruptions of

counsel's summation were in each instance entirely justified, whether it was because counsel misstated the law (1141, 1142, 1144, 1148, 1166), created a misleading impression (1151, 1160, 1165, 1170, 1171), or whether the jury needed clarification (1138, 1173). It is of interest, that Mr. DiCarlo, Miller's counsel, who was interrupted by the judge in his summation on more occasions than Mr. Sunden, does not make this claim. It should be noted that the judge also interrupted the prosecutor during his summation.

Welcome claims that the judge's animus was most clearly evidenced when he characterized an issue raised by Mr. Sunden as a "red herring". But this statement must be viewed in context: Agents of the F.B.I. testified that a key found in the bag, which Welcome had forgotten to take, fit the vestibule lock at Welcome's apartment house. To defuse the impact of this evidence, Mr. Sunden attempted to elicit from on that Willie Leach had lived at Welcome's apartment. Apparently not recalling that earlier testimony showed that Leach had lived at Welcome's apartment for a short time, the court interrupted this line of inquiry as a "red herring" (727). However, when Mr. Sunden reminded the court of the testimony, Judge Bartels agreed to permit the questions and added: "I withdraw that characterization. I withdraw it" (729). When the agent testified that he had no knowledge of whether Leach had lived with Welcome, the judge elicited from the prosecutor that Leach had indeed lived with Welcome at one time (729). After the prosecutor acknowledged this fact, again, the judge stated in the presence of the jury: "All right. I'll tell the jury to disregard my statement, that it was a red herring" (730). Thus, when viewed in context, it is clear Welcome has greatly exaggerated the importance of this remark. Such a remark, quickly and forceably corrected, hardly rises to a trial error of any real significance. Indeed as this Court recently stated in a different context, "any conceivable misunderstanding on the

part of the jury was nipped in the bud by Judge [Bartels'] emphatic curative instructions." *United States v. Bubar*, Dkt. No. 76-1140, slip. op. 4519, 4523 (2d Cir., June 30, 1977).

POINT IV

The Prosecutor's Summation Was Proper.

Appellant Miller takes issue with a portion of the prosecutor's summation which he contends permitted the jury to infer that, through its verdict, it was deciding the sentencing fates of Owens and Hodges. We fail to see any such implication in these remarks which are set forth in the margin.¹⁴

¹⁴ [Assistant U.S. Attorney Appleby]:

I also mentioned, ladies and gentlemen, that there is a second concept here. A motive to testify falsely and implicate two innocent people. I say, ladies and gentlemen, that Vanessa Hodges and DeWitt Owens do not have a motive to testify falsely and implicate two innocent people.

Why do I say that? I say that, ladies and gentlemen, because the agreement that they reached with the government is predicated on truth. On their testifying absolutely truthfully. If they testify falsely with respect to any material fact, what happens to their deal with the government? It's thrown out the window. All bets are off. We're not going to go to bat for them at the time of sentencing before Judge Bartels.

Mr. DiCarlo: I'm going to object at this time. This United States Attorney is now testifying as to what he's going to do. It's up to the jury to make that determination.

The Court: No.

Mr. Di Carlo [Counsel for Miller]: Testify falsely?

The Court: I think he's telling you the conditions of the agreement. I think there is evidence to the fact that Vanessa, I think, testified that part of the agreement was she tell the truth.

Mr. Di Carlo: But what he will do in the future——

[Footnote continued on following page]

These remarks simply do not suggest that the sentencing fates of Owens and Hodges depended on the jury finding appellant Miller guilty. The prosecutor did not state nor imply that the Government would not "go to bat" for them should the jury acquit both defendants. He merely focused the jury's attention upon Hodges' and Owens' motivation to tell the truth based upon their understanding of their agreements with the Government and explained that if Hodges and Owens should be proven to have testified falsely their agreement with the Government would be voided. This was proper argument since this is exactly what the agreements entailed. Hodges testified that her understanding of the

The Court: No. Overruled.
Proceed.

Mr. Appleby: Look, ladies and gentlemen, DeWitt Owens and Vanessa Hodges know that when they take the stand, after their direct examination, they're going to be subject to cross-examination by two defense counsel, Mr. DiCarlo and Mr. Sunden. They know that the purpose of cross-examination is to prove that they are liars.

Now, what should happen if they should implicate two innocent people in a crime they didn't commit? What happens after Mr. DiCarlo and Mr. Sunden, on their cross-examination prove that they are liars, prove that they are implicating innocent people? What happens to their deal with the government?

Do they really expect us to go to bat at the time of sentencing before Judge Bartels when they're proven to be liars by Mr. DiCarlo and Mr. Sunden? They plead guilty. Both of those witnesses before Judge Bartels. They're going to be sentenced by Judge Bartels. How do you think Judge Bartels is going to feel about those witnesses when Mr. DiCarlo and Mr. Sunden prove that they're liars? That's not going to help them out at all.

They want to make absolutely certain that they tell the truth 100 per cent, right up and down the line, because they don't want to ruin their agreement with the government. They're happy with their agreement.

agreement was that she should testify truthfully and fully, and that in return the Government would make known to the sentencing judge the nature and extent of her cooperation, but that neither the Government nor the judge made any promises as to what specific sentence she would receive (31-32, 265). Owens testified to a similar agreement with the Government (431-435; 567). There is also no basis for construing these remarks by the prosecutor to suggest his personal belief in the credibility of the witnesses.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: Brooklyn, New York
July 18, 1977

Respectfully submitted,

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Of Counsel.**

* The United States Attorney's Office wishes to express appreciation to Margaret Vaughan, a third-year student at the Fordham Law School, for her assistance in the preparation of this brief.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS

EASTERN DISTRICT OF NEW YORK

} ss

Dolores Byrd

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 22nd day of July 1977 he served a copy of the within Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Gary R. Suden, ESQ.

Dominick DiCarlo, Esq.

401 Broadway, N.Y.C. 10013

66 Court St. Bklyn, N.Y. 11201

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Dolores M Byrd

Sworn to before me this

22nd day of July 19 77

Barbara A. Allen
BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979